IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 18, 2007

MICHAEL BRANDON ADAMS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. CR221-2005 Dee David Gay, Judge

No. M2007-00396-CCA-R3-PC - Filed February 21, 2008

The petitioner, Michael Brandon Adams, pleaded guilty to aggravated child abuse and was sentenced to eighteen years in the Department of Correction. On post-conviction appeal, the petitioner argues that he received ineffective assistance of counsel because lead counsel failed to adequately investigate and interview witnesses, failed to petition the court for funds for an independent medical evaluation of the victim's injuries, failed to have the petitioner evaluated for competency, and failed to ask for a change of venue. Additionally, the petitioner claims that his guilty plea was not knowing and voluntary as a result of lead counsel's ineffective assistance. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Manuel B. Russ, Nashville, Tennessee; and Charles R. Bobbitt, Jr., Hendersonville, Tennessee, for the appellant, Michael Brandon Adams.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; and Sallie Wade Brown, Assistant District Attorney General; for the appellee, State of Tennessee.

OPINION

On July 29, 2004, the petitioner pleaded guilty to aggravated child abuse. *See* T.C.A. § 39-15-402 (2003). We begin with a summary of the factual background of the petitioner's conviction, which comes from his guilty plea hearing:

> [O]n August 3rd, 2003, the Gallatin Police Department was contacted concerning a nine-month-old male infant that had been brought to Sumner Regional Medical Center with severe burns to the

> lower extremities. The baby was brought to the ER by a maternal aunt and her boyfriend, the defendant.
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> The infant had been left at the aunt's residence by the infant's mother. Mrs. Burnley left the morning of August 3rd – this was the aunt – for work, leaving Mr. Adams as the babysitter and caregiver of the child. A short time later he called the aunt at work inquiring about bathing the baby. She evidently gave him instructions on preparing the bath. When she returned home, she said the baby's skin was peeling off and saw the infant in the kitchen sink still in the water.
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> The doctor at the emergency room examined the infant [and] determined the burns were not from accidental means. The baby was transferred to Vanderbilt Burn Center, where it was determined the baby had been held in very hot water. After being in Vanderbilt for several months, the baby was then transferred to . . . Georgia, where the baby went through rehabilitation for another several months. The mother stayed at the baby's side.

The petitioner accepted a plea agreement that sentenced him to eighteen years at 100 percent.[1] On March 28, 2005, he filed a petition for post-conviction relief. A hearing on the petition was conducted on December 8, 2006.

At the post-conviction hearing, the petitioner testified that he had originally been appointed different lead counsel, but had to be appointed a replacement when a conflict arose. He testified that his new counsel met with him "one time when we discussed if I had any witnesses or anything of that nature, but that was it." They also discussed a potential plea agreement that would have provided for a sentence of twenty years. The petitioner testified that he did not meet with lead counsel again until the day he entered into his plea agreement. His counsel told him that "the final offer was eighteen years at one hundred percent, and there was no way, none, no how . . . that I would win at trial. So that's why I decided to go ahead and take the plea bargain."

The petitioner testified that his counsel only spoke with his father once and did not contact the witnesses he provided to refute the state's evidence. He said those potential witnesses "did not actually sit there and witness the actual event, they know about my history with the individual, and they could have provided statements and evidence and so forth of how I provided and took care of the victim, which could have ultimately persuaded someone in the jury."

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[1] The petitioner also pleaded guilty to a charge of assualt and was sentenced to eleven months and twenty-nine days, to be served concurrently. However, this post-conviction appeal concerns only the plea to the aggravated child abuse charge.

Finally, the petitioner testified that he accepted the plea agreement because his counsel told him he had no chance to win, and if he went to trial he would receive a maximum sentence of twenty-five years.

When questioned by the court, the petitioner testified he was alone with the child at the time of the incident and there were no witnesses.

On cross examination, the petitioner testified that he freely signed the guilty plea and understood the agreement. At the time of his guilty plea, he stated that he was satisfied with his representation and that there was nothing additional lead counsel could have done for him.

Lead counsel testified that he has practiced in Sumner County since 1999. He practiced in Danville, Indiana before that for sixteen years, with some of his work there for the Department of Children's Services. He testified that he met with the petitioner "at least four times, probably more if you count the times that we were in court for settlement dates, and I talked to him then." He also met with the petitioner's mother and father on several occasions, obtained and reviewed discovery, and negotiated the plea agreement down from twenty to eighteen years. He testified that he told the petitioner there was "virtually no chance that he would be acquitted" and that there was a good chance he would receive the maximum sentence if the case went to trial. Counsel said the petitioner's case was hurt by the fact that he fled after the crime and had to be found by the police.

On cross-examination counsel could not say for sure how many meetings he had with the petitioner in person or by phone. Counsel testified that the petitioner had asked him to file for a change of venue but he did not feel he had a legal basis for such a motion. He said that had the case gone to trial he would have called the character witnesses given to him by the petitioner, but they would be of no help for any evidentiary issues. He would have been " happy to try the case" if the petitioner insisted.

When questioned by the court, lead counsel testified that his records show he spent 1.14 hours in court and 23.52 hours out-of-court on the case. Included in the out-of-court hours were seven documented meetings with the petitioner.

The post-conviction court denied the petition for post-conviction relief, finding that lead counsel was effective, and that the petitioner entered his plea knowingly and voluntarily. An order denying the petition was entered on December 21, 2006.

The petitioner filed a timely appeal on January 19, 2007. He now claims that he was denied effective assistance of counsel because lead counsel failed to adequately investigate and interview witnesses, failed to petition the court for funds for an independent medical evaluation of the victim's injuries, failed to have the petitioner evaluated for competency, and failed to ask for a change of venue. Additionally, the petitioner claims that his guilty plea was not knowing and voluntary as a result of lead counsel's ineffective assistance.

The post-conviction petitioner bears the burden of proving his or her allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

The Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see also Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). "Claims of ineffective assistance of counsel are considered mixed questions of law and fact and are subject to de novo review." *Serrano v. State*, 133 S.W.3d 599, 603 (Tenn. 2004); *see State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999) When a defendant claims ineffective assistance of counsel, the court must determine (1) whether counsel's performance was within the range of competence demanded of attorneys in criminal cases, *Baxter*, 523 S.W.2d at 936, and (2) whether any deficient performance prejudiced the petitioner, *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). *See also Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). Courts need not address these components in any particular order or even address both if the petitioner fails to meet his burden with respect to one. *Henley*, 960 S.W.2d at 580.

A reviewing court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2070. This court should not second-guess informed tactical and strategic decisions by defense counsel. *Henley*, 960 S.W.2d at 579. It must evaluate counsel's performance from counsel's perspective at the time of the alleged error and in light of the totality of the evidence. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2070.

However, this court's deference to counsel's tactical decisions will depend upon counsel's adequate investigation of defense options. *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126 (1987). Assuming adequate investigation, the fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. *Thompson v. State*, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997); *Jerry Whiteside Dickerson v. State*, No. 03C01-9710-CR-00472, slip op. at 3 (Tenn. Crim. App., Knoxville, Sept. 16, 1998).

In sum, a defendant is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id*.

Furthermore, "[w]hen a [post-conviction] petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Generally, presenting such witnesses in the post-conviction hearing is the only way a petitioner can establish that "the failure to discover or interview a witness inured to his prejudice . . . or . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." *Id*. Accordingly, a petitioner who establishes that trial counsel deficiently performed by failing to investigate or call witnesses is entitled to no relief "unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." *Id*. at 757-58.

When it is alleged that the ineffective assistance of counsel resulted in a guilty plea, the burden is upon the defendant to establish the prejudice prong of *Strickland* by proving that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). On review, there is a strong presumption of satisfactory representation. *Barr v. State*, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995). If prejudice is absent, there is no need to examine allegations of deficient performance. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

The record supports the post-conviction court's determination that the petitioner failed to establish his claims of ineffective assistance of counsel by clear and convincing evidence, and we agree that the petitioner's evidence in the evidentiary hearing was neither clear nor convincing.

The claim that trial counsel failed to investigate and interview witnesses was not supported by any post-conviction testimony. The putative witnesses were not even listed by name in the petitioner's brief. This claim is unsupported.

The decisions to not petition the court for funds for an independent medical evaluation and to not seek a change of venue were both tactical decisions on the part of petitioner's counsel. The argument that these decisions were incorrect is unsupported. Trial counsel testified that the motions would not have been beneficial. Also, the post-conviction court found that counsel "did an extremely good job. I find that he was diligent, that he gave you your options." We agree with the trial court and need not belabor our explanation.

Similarly, we see no evidence to support the claim that ineffective assistance of counsel resulted in the petitioner unknowingly and involuntarily entering his guilty plea. The post-conviction court stated

> [T]he proof is replete with how you were advised of your constitutional rights. The guilty plea forms and the guilty plea itself that we have a transcript for, the testimony of your attorney, all

> indicate that you knew what you were doing, and you voluntarily gave up your constitutional rights. And I find that that issue is without merit.

Given this finding by the post-conviction court and the finding that petitioner's counsel was effective in advising him of his rights, we see no evidence of deficiency. The suggestion that the guilty plea was made as a result of ineffective counsel is unsupported.

The petitioner also argues that trial counsel was ineffective for failing to have the petitioner evaluated for competency. The petitioner has waived this issue because he raises it for the first time on appeal. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived.").

Moving from the Sixth Amendment to the Fifth Amendment implications of the petitioner's guilty plea, due process demands that a guilty plea be entered voluntarily, knowingly, and understandingly. *See Boykin v. Alabama,* 395 U.S. 238, 242-44 (1969). "[T]he core requirement of *Boykin* is 'that no guilty plea be accepted without an affirmative showing that it was intelligent and voluntary.'" *Blankenship v. State,* 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Fontaine v. United States,* 526 F.2d 514, 516 (6th Cir. 1975)). The plea must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U .S. 25, 31 (1970). A plea is involuntary if the accused is incompetent or "if it is the product of 'ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *Blankenship,* 858 S.W.2d at 904 (quoting *Boykin*, 395 U.S. at 242-43).

In this case, the petitioner testified that he made the choice to plead guilty based upon his belief that he could not be successful at trial. He conceded that his trial counsel had fully explained the consequences of a guilty plea to him. Lead counsel testified that he discussed the entirety of the State's evidence with the petitioner and that it was the petitioner's choice to plead guilty. The petitioner testified that he was advised of his rights before entering his plea. Moreover, nothing in the transcript suggests that the petitioner's plea was the product of "'ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *See Blankenship,* 858 S.W.2d at 904 (quoting *Boykin*, 395 U.S. at 242-43). Under these circumstances, the petitioner has failed to establish by clear and convincing evidence that his guilty plea was not knowingly, voluntarily, and intelligently entered.

Having reviewed the petitioner's claims for post-conviction relief and holding that the record supports the post-conviction court's denial of his claims, we affirm the judgment of the post-conviction court.

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JAMES CURWOOD WITT JR., JUDGE